BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2009-342-WS

IN RE:	)	
	)	**BRIEF OF THE SOUTH**
Review of Avondale Mills, Incorporated's Rates	)	**CAROLINA OFFICE OF**
Approved in Order No. 2009-394	)	**REGULATORY STAFF**

BACKGROUND AND PROCEDURE

On June 18, 2009 the South Carolina Public Service Commission ("Commission") issued Order No. 2009-394 (herein "Order") in Docket No. 2008-460-WS approving and establishing new rates and charges for Avondale Mills, Inc. ("Avondale" or "the Company") which provides water distribution and wastewater collection service to 616 water and 495 sewerage customers in the Graniteville/Vaucluse area of Aiken County.

The Commission's Order approved a schedule of rates and charges which provided Avondale with a net increase in operating income of $567,917 which was calculated to yield Avondale an authorized Operating Margin of 12.71%. As shown in the direct pre-filed testimony of ORS witness Christina A. Stutz in Docket No. 2008-460-WS, the Company had adjusted total operating revenues of $110,766 for the test year ending August 29, 2008. Audit Exhibit CAS-1 to Direct Testimony of Christina A. Stutz. The testimony of ORS witness Willie J. Morgan reflected that the Company's proposed increase in calculated revenues would be produced in part through an anticipated 443.66% increase in residential water revenues, a 701.35% increase in irrigation water revenues, and a 495.05% increase in residential sewer revenues. Exhibit WJM-3 to Direct Testimony of Willie J. Morgan.

Prior to the hearing in Docket 2008-460-WS held before the Commission on June 2, 2009, the Commission held a public hearing in Graniteville, South Carolina at 6:00 pm on May 26, 2009.

Approximately twenty members of the public attended the hearing and six presented testimony before the Commission regarding their concerns regarding the new proposed rates and quality of service provided by Avondale.

Following the publication of the Order, on August 4, 2009, the Aiken County Legislative Delegation[1] (herein "Delegation") notified the Commission that the Delegation had received more than 150 complaints from their constituents regarding Avondale's new rates which had appeared on Avondale's customers bills dated July 31, 2009. In its letter the Delegation requested that the Commission revise/lower the rates approved by the Commission in the Order in light of the socio-economic conditions of the systems customers.

Subsequent to the establishment of this docket by the Commission, Petitions for Intervention were filed by Joe A. Taylor and Michael Hunt, who are both Avondale customers. Additionally, on August 26, 2009, Rep. Tom Young of the Delegation filed a list of 27 customers of the Avondale system who expressed an interest in testifying at the hearing on this matter.

The Commission additionally held a public night hearing in this docket on September 30, 2009 in Graniteville. A large audience attended the public hearing, and 22 customers of the system testified regarding, among other things, the effect of the rate increase on their personal finances and water use as well as their concerns regarding insufficient water pressure at points on the system, leaks in the system, and inoperable meters.

The Commission held a hearing on the Respondent Avondale's Motion to Dismiss on September 23, 2009. By a directive issued on September 30, 2009 the Commission denied Avondale's Motion to Dismiss on jurisdictional grounds and held the Company's other grounds for dismissal of this action in abeyance.

The Commission hearing on the merits of this case was held in the Commission hearing room on October 6, 2009. In addition to counsel for the Company and ORS, Intervenor Joe Taylor, members of

[1] The Aiken County Legislative Delegation cited in this matter includes State Senator Shane Massey and State Representatives J. Roland Smith and Tom Young, Jr.

the Delegation and a number of customers of the system were present. Testimony was taken by the Commission from Mr. Taylor (Intervenor), Mr. Wayne Baggett (customer), and Representative Tom Young as well as Mr. Jack Altherr (Vice Chairman, President, CEO and CFO) and Mr. Jimmy Frederick (Manager of Plant Services) for Avondale.

ARGUMENT

As argued by Avondale at the hearing on the merits, the revenue requirement, operating margin, and corresponding rates approved by the Commission in the Order were properly applied for, reviewed and approved by the Commission in its June 18, 2009 Order. ORS agrees with Avondale's position that the rates set by the Commission in Order 2009-394 were validly adopted and cannot be retroactively repealed or adjusted as the only verified evidence concerning the financial condition of Avondale, its rates, system and business practices is that offered in Docket No. 200-460-WS; all of which support the revenue requirement, operating margin and rates contained in the Commission Order. The Commission does not possess the authority to order Avondale to refund or credit its customers for charges which have been billed under Order 2009-394 as any such award for past rates or charges would effectively constitute impermissible retroactive rate-making. South Carolina Elec. And Gas Co. v. Public Serv. Comm'n, 275 S.C. 487, 490, 272 S.E.2d 793, 795 (1980).

Avondale's argument, however, that the Commission is now powerless to rescind, alter, or amend the Order in any manner in the current docket, is incorrect and counter to the specific language of S.C. Code Ann. §§58-5-320 and 58-5-270 (Supp. 2008). In fact, the authority vested in the Commission to amend its prior orders and certificates has been found by the courts to be "constructively a part of its orders." Carolina Pipeline Co. v. South Carolina Pub. Serv. Comm'n, 255 S.C. 324, 334, 178 S.E.2d 669, 674 (1971). The Commission has a continuing power to prospectively correct or reduce a previously approved charge and to modify or amend its own orders after providing notice and an opportunity to be heard. Porter v. South Carolina Pub. Serv. Comm'n, 327 S.C. 220, 489 S.E.2d 467

(1997). Further, "there is no violation of the rule against retroactive rate-making where the reduction sought is *prospective only* as in this case." Porter v. South Carolina Pub. Serv. Comm'n, 328 S.C. 222, 234, 493 S.E.2d 92, 99 (1997).

As argued by ORS at the Motions hearing, public meeting and hearing in this case, S.C. Code Ann. §§58-5-270 and 58-5-320 (Supp. 2008) provide the Commission with very specific authority to "rescind, alter, or amend any order or decision made by it." It can be presumed that a situation such as that presented to the Commission in this case is exactly what was contemplated by the South Carolina Legislature when these statutes were adopted. Through no fault of any of the parties, or the Commission, it has become apparent through the testimony of the public witnesses and Intervenors in this docket that the rates approved in Order 2009-394 have had a dramatic impact on the customers of Avondale and have created personal hardships which mandate the Commission's use of the powers provided to it by the Legislature under §§58-5-270 and 58-5-320.

Jurisdiction for the Commission in this matter is provided under §58-5-270 as well as §58-5-320, which also provides the Commission with the authority to amend Order 2009-394. As the jurisdictional issues have already been argued by the parties at length in both the hearing on Avondale's Motion to Dismiss as well as the merits hearing, ORS will limit its discussion here to the Commission's authority, and possible options, for altering or amending the Order under review.

In the present case Avondale has argued that they have not been provided an "opportunity to be heard" as there have been no specific figures, information, data or similar evidence to establish that the rates set in the Commission Order are improper or excessive. While this is true, ORS does not take the position that the rates approved in the Order are improper or excessive; only that the Commission should take action to put these rates in place gradually in order to provide the customers of the system with a reasonable amount of time to adjust their water usage and budget for the substantial increase in their monthly water and sewer bills. There is no question that substantial testimony was provided by over 20 witnesses at both the public hearing and merits hearing in this docket that the sudden implementation of

these rates was both immediate and in excess of what they had planned or budgeted for. Thus, substantial notice of the issues before the Commission was in fact provided to Avondale.

As previously stated, ORS does agree with Avondale that there is not sufficient evidence contained in the record of this case or Docket 2008-460-WS which would permit the Commission to set rates which differ from those approved in Order No. 2009-394. However, the Commission is not powerless to address the substantial and legitimate concerns expressed by the system's customers that at least some form of short term immediate relief should be provided by the Commission to allow them to adjust their water usage habits and financial budgets to prepare for the more than 400% increase in their monthly water and sewer bills.

Substantial evidence in the record of this case dictates that the Commission Order Avondale to return to charging the rates which it was charging its customers prior to the rates approved in Order 2009-394, that it be permitted to increase its rates on a pro-rated monthly basis for a period of six months until such time as it is again charging the rates approved in 2009-394, and that such monthly step-up in rates be tied to Avondale providing evidence to ORS and the Commission that it is making continued progress in upgrading its system and reducing water loss[2].

The testimony presented to the Commission from numerous public witnesses and the Intervenors Taylor and Hunt in the present case as well as ORS witness Morgan in Docket 2008-460-WS evidence that Avondale has significant infrastructure problems resulting in water losses which are detrimental to both the company and its customers. Avondale witness Altherr evidenced that Avondale has begun to make expensive and significant improvements in the Avondale system since Order 2009-394 was issued. These improvements include new water meters for all of the systems customers, new master meters, new pumps, and plans to reroute one of the system's sewer lines at an estimated cost in excess of $80,000. Additionally, Altherr testified to the discovery and repair of a substantial system leak which Avondale believes was a significant contributor to its high water loss.

[2] ORS intends to provide more specific metrics regarding infrastructure and service standards in its proposed order to the Commission.

While the Company has thus shown to have made substantial investment in its system, the testimony of the public witnesses clearly evidenced that issues remain regarding consumer complaints of low or inconsistent water pressure, leaks, inoperable meters and water loss. ORS believes that there is substantial evidence in the record to support the Commission finding that increases in Avondale's rates should be tied to verifiable continued improvements in the Avondale system and service to its customers.

The testimony of the public witnesses in this docket also provided the Commission with evidence that the customers of the system continue to experience problems with the systems water pressure and meters. Avondale witness Frederick, however, did verify that the company has recently incurred significant costs in installing new meters and pumps and has plans for several future, and even more expensive, improvements in the system. Company witness Altherr testified that while the company had located and repaired one very significant leak and continues to address the issue of water loss, that the system continues to experience an unacceptably high water loss rate. While the majority of this loss is not charged to customers of the system through rates, the company was allowed a high 20% water loss rate in Order 2009-394 and the high loss rate affects the economic viability of the company and is indicative of a need for more effective controls and improved infrastructure on the system. While witness Altherr testified that Avondale intends to use the revenues generated through the new rates to continue its current schedule of improvements, in light of the very substantial increase in rates approved by the Commission in Order 2009-394, ORS believes that the Commission may, and should, act to require prospectively that the rates approved in that Order be tied to verifiable improvements in the systems infrastructure and management.

The testimony provided by the public witnesses and Intervenors further evidence that the customers of the system, although provided with sufficient legal notice of the proposed changes in rates, did not understand the timing, amount, or impact of the new approved rates until they received their bills on or after July 31, 2009. The financial hardships testified to by the public witnesses provides the

Commission with the discretion to provide the Avondale customers with immediate relief and prospective implementation of the new rates over a period of months in order to allow these customers with a reasonable period of time in which to both adjust their water usage and financially budget for the more than 400% increase which the Company has demonstrated that it needs in order to maintain the financial viability of the system.

Avondale should not be faulted for its efforts to obtain rates which it has demonstrated the need for, or for the methods which it employed in implementing the rates approved by the Commission in Docket 2008-460-WS. As stated by the Commission in its Directive of August 12, 2009, Order 2009-394 was validly issued, and on the basis of that Order, Avondale implemented the rates which are under review in this docket. In practical application, however, it is apparent from the testimony in this docket that Avondale's customers did not fully understand the process which led to the rates approved in Order 2009-394. This is best evidenced by the water usage and bills of Avondale's customers for the months of July and August 2009 submitted in the record of this case. As shown by this evidence, when actually notified of the effect of the rate increase, they have made significant reductions in water use. Despite these efforts, however, many of the customers have continued to voice concerns about their ability to both pay for the high bills which they received in July while also attempting to pay the increased charges for current months.

The Commission is strictly prohibited from retroactively imposing new rates on Avondale or its customers and is therefore unable to affect rates and charges for the months of July, August, and September. See, Elizabethtown Water Co. v. N. J. Bd. Of Public Utilities, 527 A.2d 354 (NJ 1987) *citing* South Carolina Elec. And Gas Co. v. Public Serv. Comm'n, 275 S.C. 487, 272 S.E.2d 793 (1980) (prohibition against retroactive ratemaking is intended to protect a utility as well as consumers). The Commission is likewise, and for the same reasons, unable to order a refund or any other form of retroactive relief for rates which were approved in Order 2009-394 and charged by Avondale to its customers under that Order.

This prohibition on retroactive ratemaking, however, does not limit or prohibit the Commission from adjusting, altering, or amending the rates and conditions approved in the Order on a prospective basis based on the substantial evidence in this docket regarding the economic impact of these new rates on the systems customers. See, Porter v. S. C. Pub. Serv. Comm'n, 493 S.E.2d 92 at 99 (there is no violation of the rule against retroactive rate-making where the relief sought is prospective). The Commission additionally has wide latitude in determining its methodology in rate-setting and there is no abuse of discretion where substantial evidence supports the finding of a just and reasonable rate. Heater of Seabrook, Inc. v. Pub. Serv. Comm'n, 324 S.C. 56, 478 S.E.2d 826 (1996)

The Commission has the authority under §§58-5-270 and 58-5-320 to review the reasonableness of the rates and charges approved in Order 2009-394. The Commission is given very broad authority and discretion under these statutes to "at any time...rescind, alter or amend any order or decision made by it." In the present case, the substantial evidence in the record establishes that the immediate imposition of the rates imposed under Order 2009-394 has had a serious and detrimental impact to the customers of the system. This impact is in fact to such a degree that in several cases it is apparent that some customers may lack the financial ability to pay their water and sewer bills. This in turn may cause a new financial hardship on the company itself. The best method to avoid or mitigate these impacts is to reset the rates at their pre-Order 2009-394 level and provide for a gradual increase in rates to those approved in that Order. The Commission has the authority, and the record contains the factual evidence necessary to provide for this alteration of Order 2009-394. See, Heater of Seabrook, Inc. v. Public Serv. Comm'n, 332 S.C. 20, 503 S.E.2d 739 (1998) (although the Commission is given wide discretion in utility rate cases, that discretion cannot be exercised without substantial evidence to support the finding of a just and reasonable rate).

CONCLUSION

The Commission should issue an Order which amends Order 2009-394 to provide for the stepped implementation of the rates approved in Order 2009-394 over a period of months. Further, this stepped increase in rates should be tied to continued verifiable improvements in the infrastructure and management of the Avondale system.

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October 16, 2009
Columbia, South Carolina

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THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2009-342-WS

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Review of Avondale Mills, Incorporated's Rates Approved in Order No. 2009-394	))))	**CERTIFICATE OF SERVICE**

This is to certify that I, Chrystal L. Morgan, have this date served one (1) copy of the **BRIEF** in the above-referenced matter to the person(s) named below by causing said copy to be deposited in the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as shown below:

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October 16, 2009
Columbia, South Carolina